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Supreme Court of the United States

October Term, 1952

No. 3

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

BRIEF FOR APPELLANTS ON REARGUMENT

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SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

BRIEF FOR APPELLANTS ON REARGUMENT

This appeal by defendants from a judgment of the Court of Appeals of the State of New York was argued in this Court on February 1, 1952, and on June 9, 1952, this Court entered the following order (343 U. S. 972):

> "This case is ordered restored to the docket for reargument. In view of the opinion, concurring opinion, dissent, judgment and remittitur of the Court of Appeals of New York concerning the status of the Patriarchate in Russia, counsel are requested to include in their presentation a discussion of whether the judgment may be sustained on state grounds."

Pursuant to that order, appellants are here to reargue the cause.

Appellants' Position

The canon law of the Russian Church says that the archbishop appointed by the Patriarch has the exclusive right to occupy Saint Nicholas Cathedral, to sit in the bishop's

seat and to conduct religious services there and that occupancy or use of the Cathedral by any other person would be a breach of the canon law.

Notwithstanding this, indeed, in open defiance of the canon law, the judgment below ejects from the Cathedral the archbishop so appointed, evicts him from the bishop's seat, and bars him from conducting religious services in the Cathedral and exercising there the canonical prerogatives of his office; that is to say, it prohibits the free exercise of his religion by the canonical archbishop.

This judgment thus collides squarely with the First Amendment and, since that Amendment binds every agency of government, including the courts, it matters not at all that the judgment is based on a statute, as here, or on some rule of common law; indeed, such a judgment having such a result, cannot possibly rest on local state law beyond the power of this Court to review and correct on constitutional grounds.

Restraint on the free exercise of religion, if permissible at all, may be justified only by the clear and present danger test,[1] and since occupancy of the Cathedral by the canonical archbishop can in no wise constitute a menace to the state, there must be a reversal of the judgment below, for it is clear beyond question that occupancy of the Cathedral by the appointed archbishop, under canon law, is an exercise of religion which, under the First Amendment, neither the legislature nor the courts can prohibit or restrict.

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[1] *West Virginia School Board of Education* v. *Barnette* (319 U. S. 624); *Thomas* v. *Collins* (323 U. S. 516). In the first case this Court said that the freedoms of the First Amendment, including religious freedom, "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect" (at 639), and in the second that "any attempt to restrict these liberties must be justified * * * by clear and present danger" to the public interest (at 530).

As the *sole* justification for the judgment we are given the postulate that, because the Patriarchate pledged "loyalty" to the Soviet government, it is not a "true" Church but a "tool" (284)[2] of that government. Such a pledge, as we shall see, is required by Christian tradition, but, in any event, this postulate, even if it be not wholly baseless and arbitrary (see pp. 36-45, *infra*), cannot save the judgment from condemnation, for there is nothing in the Constitution or any perceptible radiation from it, which justifies a restraint on the free exercise of religion on such a ground or theory.

Statement of Jurisdiction

This is an appeal from a judgment of the Court of Appeals of the State of New York which sustained the validity of Article 5-C of the Religious Corporations Law of that state against the claim that, as construed and applied, it was repugnant to the First and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction of the appeal under Title 28, U. S. C., sec. 1257, and of the non-appealable issues, set forth in the assignment of errors, under sec. 2103 of Title 28 (*Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 547).

The judgment was rendered on November 30, 1950. A timely motion for reargument was made on January 12, 1951 and was denied by the state court on March 9, 1951 (298). The appeal was allowed on April 11, 1951 and this Court noted probable jurisdiction on June 4, 1951 (299, 304). The appeal was argued here on February 1, 1952 and on June 9, 1952 this Court ordered reargument.

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[2] Unless otherwise indicated numbers in parentheses refer to pages of the printed case on appeal filed in this Court.

Appellants' motion for reargument was denied by the Court of Appeals in the following memorandum (298):

> "Motion for reargument denied. Motion to amend the remittitur granted * * *.
>
> Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether Article 5-C of the Religious Corporations Law, as construed by this Court, violated any rights of the defendants guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. This Court held that the aforesaid statute did not violate any of the rights of the defendants guaranteed by those amendments to the Constitution of the United States."

The Statute Involved

The statute is Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, ch. 693, as amended by Laws of 1948, ch. 711; Vol. 50, McKinney's Consolidated Laws of New York). Its full text is set forth in Appendix A annexed hereto. In substance:

(a) It defines a group of churches as a separate and autonomous religious body called the "Russian Church in America". Until April 1924, this group of churches had belonged to a larger group constituting, under successive names, the American Diocese of the Russian Orthodox Church, and had theretofore been subject to the jurisdiction of the Most Sacred Governing Synod in Moscow and later the Patriarch of Moscow. In April 1924, at a convention in Detroit, this group of churches constituted themselves an "administratively autonomous metropolitan district", and thus seceded from the American Diocese and from the Russian Orthodox Church to which the American Diocese remained subject (sec. 105).

(b) It defines a "Russian Orthodox Church" as a church, "founded and established for the purpose

and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district hereinabove defined as the Russian Church in America".

(c) It provides for the government of incorporated Russian Orthodox Churches (as above defined). It directs that "every" Russian Orthodox church in the State of New York, no matter when incorporated, "shall recognize and be and remain subject to the jurisdiction and authority of the * * * metropolitan archbishop or other primate or hierarch * * * of the Russian Church in America" (sec. 107(1)). And it gives to the trustees of every such Russian Orthodox church "the custody and control" of all its temporalities and property, and requires them to "administer" the same "in accordance with the rules and statutes * * * of the Russian Church in America" (sec. 107(3)).

STATEMENT OF THE CASE

The Nature of the Action

The action in form is one in ejectment by appellee, a New York corporation, which holds the nominal legal title to the premises and is brought on behalf of the metropolitan district and its elected archbishop. "This is not, however, the ordinary ejectment action," said Judge Conway for the majority (270), and they decided the case on the issue whether the patriarchally appointed or the locally elected archbishop has the right to occupy the Cathedral (274).

The complaint alleged that appellee was a New York corporation, that it was seized in fee of the described premises, where Saint Nicholas Cathedral was located, and that it was entitled to immediate possession thereof, which was wrongly withheld from it (1).

Appellants denied the material allegations of the complaint (2) and appellant Benjamin alleged, as an affirma-

tive defense, that, under the canon law of the Russian Church, Saint Nicholas Cathedral was reserved for the exclusive use of the archbishop appointed by the Supreme Church Authority, to wit the Patriarch, that he was such appointed archbishop, and under canon law, he was entitled to the exclusive possession of the Cathedral (3-4).

Appellant Kedroff's right to remain in the Cathedral derives from the consent of the appointed archbishop.

The identical issue was raised and decided, before Article 5-C was passed, in favor of the appointed archbishop in *Kedrovsky* v. *Rojdesvensky* (214 App. Div. 483, aff'd 242 N. Y. 547). There the action took the form of a suit by the appointed archbishop for an injunction to restrain Platon Rojdesvensky, who had been elected archbishop of the metropolitan district, from occupying Saint Nicholas Cathedral (literally to eject him), on the ground that Platon was *not* the appointed archbishop and that his occupancy was a deviation from the ecclesiastical use to which, under canon law, the Cathedral had been consecrated. Both parties there relied on the undoubted rule of canon law that the centrally appointed archbishop had the exclusive right to occupy the Cathedral and each claimed to be such appointee. Platon's claim to the Cathedral on the ground of appointment was rejected as matter of fact and his claim on the ground of local election was rejected as matter of canon law. There, too, the claim was made that the Sobor of 1923, which had appointed Kedrovsky, had been subverted by the Soviets but, said the Court, to award the Cathedral to Platon "on the theory that the doctrinal necessities of the Russian Church require it, would put a civil tribunal of New York in ascendancy over the ecclesiastical authority in the decision of a purely ecclesiastical question with which it can have no concern" (214 App. Div. at 489)—that is to say, it would be unconstitutional.

The Opinions Below

The trial judge sustained Metropolitan Benjamin's defense, held in favor of the appointed archbishop on the authority of *Watson* v. *Jones* (13 Wall 679) and the *Kedrovsky* case, *supra*, and ruled that Article 5-C had no application to the case (192 Misc. 387).

The Appellate Division affirmed by a vote of three to two (276 App. Div. 309), the majority holding that, if it were construed in a contrary sense, the statute would unlawfully interfere in the internal affairs of the Church, in violation of the First Amendment and the principle of separation of Church and State therein embodied. As the ultimate authority on the facts, the majority affirmed the findings of the trial court that appellant Benjamin was the archbishop canonically appointed by the Patriarch and, under canon law, was entitled to the exclusive possession of the Cathedral. Answering the contention of the dissent in that court, that the Patriarchate was not a "true" Church but a mere instrumentality of the Soviet government, the majority said that this was a "position which we find the plaintiff does not contend for", that this is not a matter appropriate for judicial notice and that the record facts were to the contrary (276 App. Div. at 318-319).

The Court of Appeals reversed by a vote of four to three. There was a "prevailing" opinion by Judge Conway, a "concurring" opinion by Judge Froessel and a minority opinion by Judge Desmond, in which Chief Judge Loughran and Judge Fuld concurred.

Judge Conway pointed out that Article 5-C was amended in 1948 specifically to overcome the decision of the trial court (278-9), that the statute, as amended, had a "conclusive" effect on the litigation (271) and, accordingly, he reversed and gave final judgment to appellee on the ground that the "plaintiff corporation and the autonomous metropolitan district which it represents, must prevail in this action *in accordance with the legislative finding and*

mandate and be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral" (284, italics added).

The final judgment from which this appeal is taken is thus clearly based on the statute—the legislative mandate.

Judge Conway also discussed the rights of the parties on common law lines and he developed a theory, wholly unprecedented, erroneous and unconstitutional, which cast the archbishop in the role of "trustee" of the Cathedral and invested the civil courts with the discretionary power to determine (irrespective of what the canon law said) whether the patriarchally appointed or the locally elected archbishop would be the more "faithful trustee" of the Cathedral.

Judge Conway acknowledged, however, that the trial courts did not adopt his theory but followed instead the principles of *Watson* v. *Jones* and enforced the canon law of the Church, which reserved the Cathedral for the exclusive use of the appointed archbishop (273-4). He ruled that this was error and added that "Our views on this aspect of the controversy would require reversal and the *ordering of a new trial* so that the (State) Supreme Court might exercise its discretion along the lines here indicated" (274, italics added).

The "lines here indicated", under his theory, meant this: the civil court may remove a "faithless", that is, a dishonest trustee and appoint another in his place. The archbishop is the "trustee" of the Cathedral. If the Patriarchate is not a "true" Church, the civil courts may, in their discretion, remove its appointed archbishop from the Cathedral and select a more "faithful trustee" in his place. Accordingly, on the new trial, the trial court should make full inquiry as to the status of the Patriarchate and its relation to the Soviet government and explore the issue whether the appointed or the locally elected archbishop

would be the more "faithful trustee" of the Cathedral.[3]

However, Judge Conway found it "unnecessary" to discuss this "aspect of the case further" (274), i.e. whether he should order a new trial, because, as he said, there is another ground requiring reversal—not to order a new trial—but to direct final judgment in favor of appellee (275), viz., the "conclusive" legislative "mandate", i.e. the statute.

Judge Conway's discussion of his common law theory was in reality *obiter*, and merely a prelude to his theory supporting the constitutionality of the statute. For, notwithstanding that the statute contains no declaration of policy or findings of fact, and was passed without any hearings or committee reports, and without a vestige of justification, he reads his common law theory into the statute by "presumption" and discovers there (what he himself put there in the first place) a legislative "determination" that the Patriarchate is not a "true" Church but a "tool" of the Soviet government, and a legislative "mandate" that, for that reason, the Patriarchal Church be suppressed, the Cathedral taken from it and transferred to the metropolitan district (281, 283, 284). All this, of course, is pure fancy, for no such "determination" is to be found anywhere in the statute.

Whatever obscurity may exist as to the grounds of Judge Froessel's "concurring" opinion, is dissipated by his reference to the facts "as found by the legislature" (285), by his double reference to Judge Conway's opinion

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[3] Although he characterized as "determinative" (272) his postulate that the Patriarchate is not a "true" Church, Judge Conway acknowledged its factual infirmity and said that "further inquiry might well have been made (at the trial) into the present status of the Patriarchate in Russia" (274). And of course, on the new trial, appellants would have full opportunity to develop at length what they did only incidentally, because the issue was not raised at the trial, viz., establish the falsity of the claim that the Patriarchate is not a "true" Church.

as the "prevailing opinion" (285, 286), and his concurrence therein (286). This means that, if the case had been decided on common law grounds, a new trial would have been ordered; but, since it was decided on the basis of the statute, final judgment in favor of appellee was awarded, without ordering a new trial, in accordance "with the legislative finding and mandate" (284).

Judge Desmond's dissenting opinion (286-96) is a complete refutation of the position of the majority and constitutes an insuperable intellectual barrier to an affirmance of the judgment below or even an avoidance of a decision by this Court on the constitutional issue. In his view, the majority reading of the statute violates basic canons of construction, reads into it a "hidden" purpose contrary to its plain intent (293), transforms it into a legislative "coup", dispossessing the Patriarch of his traditional canonical jurisdiction over the Cathedral (291), nullifies the canon law of the church, in defiance of *Watson* v. *Jones*, and renders the statute "plainly unconstitutional" (291). He declares that "no other decision reaching such a result can be found in the books" (287), that the appointment of Metropolitan Benjamin as archbishop is an ecclesiastical act which "is final and absolutely binding" on the civil courts (288), that his "possession of the Cathedral is not subject to control by any civil authority or by any judgment of a civil court" (288), and that the motivation of the Patriarch is no constitutional concern of the legislature or the courts (289). And he concludes: "How can there be any dispute but that this Article 5-C, if read so as to take this archbishopric from the central church and give it to appellee's group is unconstitutional" (293).

Let us now turn to the Russian Church, the Constitution and Article 5-C.

The Nature of the Russian Orthodox Church

The Russian Orthodox Church is a constituent member of that group or family of Churches commonly known as the Greek Catholic or Eastern Orthodox Church and whose official name is the "Holy Orthodox Catholic Apostolic Eastern Church".

The original core of the Eastern Church consisted of the ancient Patriarchates of Alexandria, Jerusalem, Antioch and Constantinople, all of whom still exist,[4] and to which have been added, in the process of time, the Russian Church, the various national churches of the Balkan States and other churches in Central Europe,[5] all of whom are in canonical communion with each other.

The Russian Church is Greek because it follows the text of the Bible as originally written in the Greek language.

It is Eastern not only because of its geographic location but by reference to the origin of Christianity in the East.

It is Orthodox because, in its view, it adheres strictly to scripture and the Holy Tradition in their original form;

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[4] The Patriarchs of Constantinople and Antioch have substantial jurisdictions in the State of New York and by Article XV and sec. 15 of Article 2 of the Religious Corporations Law, passed in 1943, these two Patriarchates, together with those of Moscow and Yugoslavia, are designated the "Primary Orthodox Greek Catholic" jurisdictions in that state (Vol. 50, McKinney's Consolidated Laws of New York).

[5] The Uniates, chiefly found in Central Europe, follow the practices of the Eastern Church but accept the Pope as their supreme authority. Periodically, as the political control of the territory in which they lived changed hands, the state compelled them to change their ecclesiastical allegiance. The fate of these Uniates is a standing warning against any attempt by the civil authorities to control the ecclesiastical allegiance of any religious group.

whereas, in its view, the Roman Church has departed therefrom, particularly in the adoption of the *filioque* clause.[6]

It is Apostolic, that is to say, it traces its origin and succession by direct and unbroken descent from Christ and his disciples and claims that this apostolic succession has been in the past and is now being preserved and continued by its governing hierarchy.

It is Catholic, that is to say, universal. It is hierarchal, authoritarian and episcopal, thereby differentiating it, in its form of government, from the Presbyterian and Congregational Churches.

The Government of the Russian Orthodox Church

The supreme authority of the Russian Church is vested in a chief episcopus or Patriarch; he in turn is elected by Sobors or general conventions of the Church (10-11, 163).

From the time of Peter, no Sobors were permitted by the Czars (89). Peter abolished the office of Patriarch and vested supreme authority in a Sacred or Holy Synod, of which his procurator, a lay functionary, was the chief official (88-9). In 1917-18 the first Sobor since Peter's time was held in Moscow and that body restored the authority of the Patriarchate (10-11, 21). There was a brief interregnum during the early years of the Russian Revolution, but by 1927, the Patriarchal Church had been re-

[6] The Orthodox creed is that the Holy Spirit proceeds from the Father alone whereas the Roman Catholic doctrine is that the Holy Spirit proceeds from the Father and the Son. The two Churches also differ in their views as to the status and role of Purgatory and the Virgin Mary in Christian theology and in their liturgy and ritual. The Orthodox Church disputes the Papal claim to primacy, to Petrine succession and to infallibility. For centuries these two great Churches, except for occasional abortive attempts at union, have stood apart.

established (107, 164).[7] The last Sobor was held in 1945 and the present Patriarch was then elected (164, 107-108). The canonical validity of this Sobor and the Patriarch's election is not questioned (31, 244, 246) and he is named in the prayers of the local churches (31). The Appellate Division found that appellee "recognized the 1945 Sobor as authentic and as restoring the Moscow Patriarchate" (276 App. Div. at 318-19). The Patriarch is in full communion with all Eastern Churches (107-108, 37), and in 1948 they celebrated with him the 500th anniversary of the autocephally of the Russian Church. The Anglican Church has recently resumed negotiations with the Russian and other Orthodox Churches to explore a basis for union between them.

The American Archdiocese

The Russian is a missionary church. After founding missions in China and Japan, the Russian Church first established itself on this continent at the end of the 18th century in the Aleutian Islands and Alaska at a time when these territories were part of the Russian Empire. When Alaska was ceded to this country the authority of the Holy Synod over the Diocese of Alaska remained undisturbed. Thereafter the Church established a number of communities in this country and Canada (7, 11-12).

At first the Russian Church here was called a Mission, then a Diocese, then an Archdiocese. Its official name, which bears the stamp of its origin, is "Archdiocese of the Aleutian Islands and of North America" (7, 236). It was a constituent part of the Russian Church at large (21, 164).

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[7] The trials of the Russian Church parallel those of the French Church during the French Revolution (Phillips, *The Church in France, a Study in Revival*, pp. 7-19, 23-41).

The Government of the Archdiocese

At first, the Church on this continent was governed directly by the Holy Synod (12), then through its agent, the archbishop, who was appointed by the Synod (12-13, 15), and answerable exclusively to it.

Under Russian Church law, which remains unaffected by any changes in temporal power, the archbishop of the American Archdiocese is not *elected* by the local churches or clergy; they have no power to do so; he is *appointed* only by the Supreme Authorities of the Church at large (20, 22, 25, 135-6). Thus, the enactments of the Sobor of 1917-18, which had "indisputable canonicity and validity" (254), declare that "Bishops to the foreign missions shall be appointed by the Sacred Synod" (20). The American Diocese was and is a foreign mission (128). In point of fact, all the archbishops who served here were in each instance appointed by the central authorities (16). Indeed, such appointments were, prior to 1917, by ukase of the Czar (89). The Diocese was governed, not by the local churches or clergy, but by the appointed archbishop, and he was answerable not to them, but to the authorities who appointed him (15-16).

Relation Between the American Archdiocese and the Church at Large

The Russian is a Catholic Church. It is not an aggregate or collection of separate or discrete parts, of parishes and dioceses, which are free to federate or separate at pleasure. An Orthodox Church is an indivisible whole. Indeed, it has no parts. It is a unit and, by hypothesis, no diocese or parish may of its own will leave the Church or consider itself a part of the Church and live "autonomously", without breaking the unity, the indivisibility, of the whole. There is and can be only one Russian Orthodox Church.

Canon law does not permit secession or fission in the church under this or that set of circumstances, for this or that reason; there is an absolute bar to such conduct (165). Autonomy cannot be seized, it must be granted. And those who by assertion of their own power undertake to secede or to be "autonomous" or "self-governing", cut themselves off from the Church and all rights to its property (*Watson* v. *Jones*, 13 Wall 679; *Trustees of Presbytery* v. *Westminster Church*, 222 N. Y. 305).

Saint Nicholas Cathedral

The land on which St. Nicholas Cathedral was later built was bought in 1899 in the name of a corporation, organized that same year, of which the Russian Ambassador and the Consul General were the sole trustees (232).

The Cathedral was built about 1903 with money supplied by the Church in Russia and the Russian government, amounting to about $150,000 and they thereafter contributed substantial sums for its maintenance and upkeep (164, 14). Bishop Leonty, appellee's witness, confirmed that "large sums of money were sent by the Russian Church and the Russian government from Russia to acquire the land and build the Cathedral" (14) and that he was "told" that "some money was raised in New York for the Cathedral" (13). Judge Conway says that the Cathedral "was constructed with funds supplied partly from abroad and partly from local contributions" (253), but this hardly does justice to the facts. In 1905, the Cathedral was consecrated as the See of the American Diocese and the official residence, place of worship and headquarters of the appointed archbishop (164-5, 166, 13, 17), and in the words of Bishop Leonty, it "started as a Cathedral of Russia" (8).

The right of the duly accredited archbishop of the American Archdiocese, appointed by the Supreme Church Authorities in Russia, as an attribute of his episcopal office, under the canon law of the Russian Church, to occupy

and use Saint Nicholas Cathedral as his residence, as a place of worship, and as the seat of his government of the Archdiocese, has never been questioned. Even the majority acknowledge as much.[8]

The testimony of the witnesses is unanimous on that point (17, 164-5, 136). All the appointed archbishops have so occupied it (16-17). Occupancy of the Cathedral by any one other than the appointed archbishop would violate the canon law of the Church (17, 165). Appellant Metropolitan Benjamin is the accredited archbishop by virtue of his appointment to that office by the Patriarch (166, 127, 226). The validity of his appointment is not in dispute and Judge Conway refers to him as "the appointee of the Moscow Patriarchate" (274). His status was affirmed by the present Patriarch (227) whose canonicity is acknowledged by appellee. He has been occupying the Cathedral as such archbishop since 1945 (136-7).

As we have seen, the *Kedrovsky* case (214 App. Div. 483, aff'd 242 N. Y. 547), which, in principle, is identical with the one at bar and, apart from the statute, is decisive of the case, held that the canon law of the Church is supreme, that under that law, the Cathedral is held for the exclusive use of the archbishop *appointed* by the Chief Authorities, and, in a suit similar to ours, the Court awarded the Cathedral to such appointee against the claim of the archbishop *elected* by the metropolitan district.

Notwithstanding the above, Judge Conway says that the Cathedral was "dedicated to the use of all the members of the diocese" (253). This is an *ad hoc* assertion which serves his theory (see *infra*, pp. 46-50), but is without any supporting evidence, is wholly arbitrary and is refuted

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[8] "All three duly appointed archbishops, in conformity with the rules of the Russian church used and occupied St. Nicholas Cathedral, as their administrative headquarters and as a place of worship. Those three archbishops were in proper and direct canonical succession and as to that there is no controversy" (255).

by his own acknowledgment that the edifice was consecrated as a Cathedral.

Apart from the *conclusive* evidence on this point, if there are any pertinent facts of which this Court can properly take judicial notice, they are the interlocking status and relationship of the ruling archbishop of a diocese and its cathedral under the canon law, usages and discipline of all hierarchical churches. An hierarchical church is an indivisible spiritual domain, canonically dependent on and governed by the supreme apostolic hierarch, directly and through his canonical subordinates. A diocese is an integral part of that domain, governed by such a canonical subordinate. The cathedral of a diocese is by definition the official residence, administrative headquarters and place of worship of such governing canonical subordinate; and its consecration as a cathedral means its dedication to such use and occupancy.

A diocese is not a parish; a diocesan bishop is not a parish priest; a diocesan cathedral is not a parish church; and an hierarchial church is an authoritarian, not a congregational church. The status and relationship of Metropolitan Benjamin and Saint Nicholas Cathedral under the Patriarch are similar to the status and relationship of Cardinal Spellman (as Archbishop) and St. Patrick's Cathedral under the Pope, for similar reasons of canon law, usage and discipline; and the civil authorities have no more right or power to oust Metropolitan Benjamin from St. Nicholas Cathedral than they would have in case of a schism in that Archdiocese, to oust Cardinal Spellman (as Archbishop) from St. Patrick's Cathedral.

Under canon law it is the Patriarch and not the faithful of the diocese and, certainly, not a majority of them, who determine who shall be the archbishop or who shall occupy the cathedral. It is unnecessary to determine here the nature and extent of any rights the members of the diocese may have in a diocesan cathedral of an hierarchal church

(and we do not here acknowledge that they have any). For whatever those undefined rights may be, they are incidental and subordinate to the rights of the canonical archbishop, and cannot include the right to oust him, because the Russian is not a congregational Church.

The Metropolitan District

In 1924, a group of Russian churches met at a convention in Detroit and declared themselves "temporarily" to be a "self-governed Church • • • governed by an elected Archbishop" and elected Platon (Rojdesvensky) as their Archbishop (187-9).[9]

This "self-governed church" is the "administratively autonomous metropolitan district" which the statute calls the "Russian Church in America" (105).

Our record says that a "number" of churches attended the Detroit convention (24). Bishop Leonty at the Kedrovsky trial said that 160 out of 190 churches attended. A number voted against autonomy (187-8). In 1945 the district claimed 358 churches (215) and in 1948 only 250 churches (159), revealing a substantial split. The Patriarchate claimed that 50 churches adhered to it (130) and the district acknowledges that 13 did so (215).

In 1934, Metropolitan Theophilus was elected head of the district to succeed Platon who had died in the meantime (25, 28). In 1936, the district subjected itself to the supreme authority of a Synod of Bishops, domiciled in

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[9] The autonomy was not declared "pursuant" to the order of November, 1920 (177-9), as the majority assert (284). This order was *not* referred to in the resolutions in Detroit (187-9) and the district did *not* rely on this order in the *Kedrovsky* trial in 1924—a most strange omission if the autonomy had been based on it. Any action taken thereunder had to be confirmed by the Patriarch (179) and the organization of the metropolitan district was condemned (165-6, 189, 224, 141).

Karlovitz, Yugoslavia, calling themselves the "Russian Church Abroad", which purported to act as a rival to the Patriarchal Church outside Russia (32-4, 238, 240). The district pledged "loyalty" to this Synod of Bishops (151-2, 243-4), which first sought the restoration of the Czar (Spinka, *The Church and The Russian Revolution*, p. 166), then joined its fortunes to those of Hitler (144, 145-6) and, with the liberation of Yugoslavia, followed him back to Germany (143-4, 32). The district continued under the authority of this Synod while Hitler was in control of Yugoslavia, but when the "Russian Church Abroad" had ceased to exist altogether (147, 243-4), it withdrew from that organization and, at its convention in 1946, "resolved that His Beatitude Alexy, Patriarch of Moscow and all Russia, be requested to continue us in his fold and be our Spiritual Head" on terms of autonomy (222).

The life history of the metropolitan district is this: In 1924 it withdrew from the Russian Church at large; in 1936 it subjected itself to the authority of the Karlovitz Synod; and in 1946 it seceded from that organization and sought to rejoin the Patriarchate. Although Judge Conway finds the recent history of the Russian Church "vital to our (his) inquiry" (253), he wholly ignores this Karlovitz episode which took up more than one-third of the life of the metropolitan district.

The Patriarch at all times took the position that the organization of the metropoltan district and the actions of Platon and Theophilus violated "the canons, rules and usages of the Russian Orthodox Church and are null and void" (165, 224-5, 147-8, 149) and placed Platon and Theophilus under suspension (165-6, 225). Like rulings were made outlawing the Karlovitz Synod from the very beginning (141-3, 109-10).

Negotiations Between the Patriarch and Metropolitan Theophilus

Subsequent to the Sobor of 1945, where the present Patriarch was elected, negotiations for reunion between the Patriarch and the metropolitan district proceeded up to the date of trial in 1948 (131-3, 219-21). Representatives of the district had arrived one day too late to attend this Sobor (126), but, since the district was then under patriarchal suspension and was subject to the jurisdiction of the Karlovitz Synod, it had no canonical right of representation. However, they received from the Patriarch the proposal of February, 1945, as a basis for negotiations for reunion (127, 227-8).

It proposed that all the Russian churches on this continent convene at a new Sobor, that these churches organize themselves into a patriarchal exarchate which should have extended powers, including the right to elect its own archbishop, subject however to the right of the Patriarch to refuse confirmation "for any motivated reason whatsoever" (227-8).

In a highly self-serving manifesto (209-19), the *leaders* of the district rejected this proposal on the alleged ground that there was "implicit" in it (216) a pledge of loyalty by the local clergy to the Soviet government (216-9).[10] The claim was unfounded and Professor Feodotov, appellee's expert, acknowledged that the offer made no such demand (157-8). To be sure, the proposal requested that the local church declare its "abstention" from political activities against the U.S.S.R. but this did not differ greatly from the policy which the metropolitan district itself had previously adopted when it declared (216):

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[10] In this respect the manifesto followed the familiar propaganda technique of ascribing to an opponent unacceptable claims *not* made by him, as a prelude to a rejection of his proposal.

> "The Council of Bishops finds it necessary to recommend to the clergy of the Metropolitanate, for the general welfare, not to touch upon political questions and not to make any public speeches on the subject, especially from the pulpit".

Metropolitan Benjamin testified that the policy of the Patriarchate was that of "refraining from politics only * * * both in the Church and in the name of the Church" (114, 122) and "that the answer of the Russian Church is absolutely clear. It cannot prevent any citizen from fulfilling his obligation and does not demand it" (124).

The *membership* of the district saw in the Patriarch's proposal no demand for such a pledge of loyalty, for in their 1946 convention they requested the Patriarch to "continue us in his fold" on terms of autonomy (222).

And neither, for that matter, did the *leaders* of the district, notwithstanding their manifesto, for in a telegram to the Patriarch, Metropolitan Theophilus said that it was his "pleasant duty to communicate * * * to your Holiness" this request for reunion (220).

In his reply, the Patriarch welcomed this decision and said that "on principle" he had no objections to autonomy and he indicated that he was sending Metropolitan Gregory to decide all questions with Metropolitan Theophilus (220).

Metropolitan Theophilus acknowledged that this message "has brought us great joy", that "We await from your Holiness an official ukaz recognizing autonomy for our Church", and expressed the hope that "everything will be decided peacefully for the good of the unity of the Church" (221).

Metropolitan Gregory did come here but the negotiations did not bring about an agreement and he gave his evidence at the trial without being cross examined (163-7). We invite an earnest examination of his testimony for, in our opinion, it constitutes a complete refutation of Judge Conway's position.

From the foregoing, the following conclusions emerge clear and indisputable:

1. The negotiations for reunion foundered, not on the spurious claim that there was a demand for a pledge of loyalty to the Soviet government, nor on the equally spurious claim that the Patriarchate was not a "true" religious body but a "tool" of that government, but, as the Appellate Division, the ultimate authority on the facts, found (276 App. Div. at 319-20), on the purely ecclesiastical issue as to the extent of the patriarchal power to confirm locally elected bishops. Even in its demands for full autonomy, the metropolitan district acknowledged that to the Patriarch was to be reserved "the right of appeal of Bishops, the bestowal of the Holy Myrrh, the awarding of higher titles to the clergy, communications with the other Orthodox Patriarchates" (216-7), but, whereas the Patriarch sought the right to refuse confirmation of locally elected bishops "for any motivated reason whatsoever" (228), the metropolitan district sought to limit this right of veto "only on strictly canonical or moral grounds and after full and impartial hearing" (218).[11]

2. The negotiations for reunion constitute a complete refutation of the claim that the Patriarchate was not a true religious body but an agency of the Soviet government.

3. Neither at the trial nor in the Appellate Division, did appellee itself, as that court found, claim that the Patriarchate was not a "true" Church. The record shows (148-9):

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[11] The canon law provides that where a bishop may be elected locally, "his election shall be submitted to the confirmation of the Supreme Church Authority" (20, 136, 26-7). Such confirmation is indispensable to apostolic succession. Canonically, a priest cannot be "elected" a bishop; he is merely "elected" a candidate for confirmation and consecration by Higher Authority, and such an "election" is not binding on the Patriarch. The metropolitan district itself acknowledged as much.

"The Court: It seems to me that nine-tenths of the evidence adduced so far on both sides is completely foreign to the issues in this case. I can't understand. After all, there is no jury in this case and you gentlemen seem to be proceeding on the theory that the political tincture of the respective factions has something to do with their right to occupy this Cathedral. I am sure that you are not soberly advancing the idea that because one faction may be Communist or anti-Communist, or one faction may be Fascist or anti-Fascist, it has anything to do with the right to occupy the Cathedral.

Mr. Arkush: I certainly haven't advanced any such idea.

The Court: I dare say 75% of the evidence has been directed towards that proposition.

Mr. Arkush: Our endeavor was to show that the Patriarchal Church was cut off from communication with America and therefore we came under the jurisdiction of the ukase to declare our autonomy.

The Court: That was twenty years ago."

4. The theory that the Patriarchate was not a "true" Church but a "tool" of the Soviet government and the theory that it should be presumed that Article 5-C so declared, was invented and first introduced into the case by Judge Van Voorhis, dissenting in the Appellate Division, and was later taken over bodily by Judge Conway and his associates.

Specification of Errors

The New York Court of Appeals erred in reversing the judgment in favor of appellants and awarding judgment in favor of appellee.

Appellants tender the following issues which have been included in the assignment of errors.

The Constitutional Issues Presented

1. Is the ouster, by force of Article 5-C, of appellant Benjamin, the appointed archbishop, from St. Nicholas Cathedral, a violation of protected religious liberty?

2. Is such ouster, by force of the statute, a deprivation of property without due process?

3. Is the ruling that the Trial Court has the power to exercise its "discretion" to determine if the appointed archbishop is a "proper trustee" or a "proper person" to occupy St. Nicholas Cathedral, a violation of protected religious liberty?

4. Does the judgment below in other respects violate due process of law?

Summary of the Argument

The Russian Orthodox Church is Apostolic, Catholic, Episcopal and Hierarchal; and its supreme authority is a Patriarch.

The American Archdiocese is an integral part of the Russian Church and is subject to the ecclesiastical jurisdiction and government of the Patriarch and the archbishop appointed by him.

The Archbishop of the American diocese is appointed by the Patriarch; and even in those cases where a bishop may be elected, his election must be confirmed and his consecration ordered by the Patriarch, in order to secure apostolic succession.

St. Nicholas Cathedral was built and maintained by the mother church and by its authority was consecrated a Cathedral of that church and, under canon law, this Cathedral is reserved for the exclusive use of the archbishop appointed by the Patriarch, and its occupancy by any other person would be a breach of canon law.

The holder of the "legal title" to the premises, whether a natural person or a corporation, has no right whatever to determine who shall occupy the Cathedral. That is decided exclusively by canon law.

Metropolitan Benjamin is the archbishop of the American diocese by appointment of the Patriarch and, under canon law, has the exclusive right to occupy St. Nicholas Cathedral, to sit in the bishop's seat and conduct religious services there. Such appointment is an official act and a decision on a denominational matter of internal church government by the supreme church authority and as such is final and absolutely binding on the civil courts. His right to the exclusive possession of the Cathedral may not be limited by any judgment of any civil court and no civil court may decree possession of that Cathedral to any other person against the authority of the Patriarch (*Watson* v. *Jones*).

Under the First Amendment, made applicable to the states by the Fourteenth, the state is forbidden to pass any law "respecting an establishment of religion or prohibiting the free exercise thereof". That means that the state has no power to interfere in or regulate the internal affairs of a church, to prescribe its ecclesiastical allegiance, to nullify its canon law or bar its ministers from exercising their religious functions, in accordance with that law.

Article 5-C, as construed below, by directing that the appointed archbishop be ejected from the Cathedral and that possession thereof be awarded to a locally elected but unconfirmed archbishop, nullifies the canon law of the Russian Church, alters the government of that Church, interferes with the free exercise of religion by the appointed archbishop and establishes the metropolitan district as the *orthodox* Russian Orthodox Church in New York, in contravention of the First Amendment.

Religious liberty may be restrained, if at all, only by the clear and present danger test. Restraints on occupancy

of the Cathedral by the appointed archbishop cannot possibly meet this test and accordingly violate the First Amendment.

The alleged pledge of "loyalty" by the Patriarch to the Soviet government was required by Christian tradition. The postulate that, because of this pledge, the Patriarchate is not a "true" Church but a "tool" of the Soviet government, is wholly baseless and arbitrary; is contradicted by the record and cannot rest on "judicial notice". This postulate is not found in the statute, cannot be read into it by "presumption" and, in any event, cannot furnish constitutional justification for a restraint on the free exercise of religion.

The judgment was not based on common law and, if it had been, a new trial would have been ordered; but a new trial was not ordered, and final judgment was directed against appellants, *solely* by the "mandate" of the statute.

But even if the judgment were based on common law grounds, it would be equally repugnant to the First Amendment, which binds all agencies of government, including the Courts.

The state cannot, under the guise of supervising the conduct of trustees or regulating the use of real property, curtail religious liberty.

The judgment below does not and cannot possibly rest on independent and adequate grounds of state law beyond the jurisdiction of this court to review and correct.

Apart from its invalidity on the ground that it curtails religious liberty, the judgment below, because of the basic errors on which it is founded, violates due process of law.

POINT I

The statute, as construed and applied by the Court of Appeals, constitutes an abridgment of freedom of religion guaranteed by the First Amendment to the United States Constitution, made applicable to the State by the Fourteenth.

A. The First Amendment withdraws from the civil power the entire field of religion and the internal government of all religious societies.

The command of the First Amendment, which now binds the states as well, is that Congress

> "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

Here was a new and revolutionary principle of government and its full scope can best be appreciated by considering the theories governing the relation of Church and State which had heretofore existed and which in effect were rejected by the First Amendment.

The Western Medieval Theory—Theocracy

To the medieval mind, society was a unity the government of which was divided between the Church and the Prince. The accepted view was that there was one true faith and one true Church which it was the duty of the secular power to safeguard. In turn, the Church taught obedience to the state. The Church defined heresy and the state punished the heretic, not merely to preserve the faith and the Church, but also for the eternal good of the heretic—by enforced salvation. The right of the individual to choose his own faith or his own Church, or the right of a competing Church to exist at all, was wholly inadmissible (Brown: *Church and State in Contemporary America*, pp. 58-9, 184-193).

The relation of Church and State in the Middle Ages was further complicated by the claim of the Pope to supremacy in temporal affairs as well. After the fall of Rome, the Western Church, as the only remaining unified body, filled in the power vacuum of the time and became, as it were, the residuary legatee of the Roman Empire. Under the guidance of strong personalities, the Popes claimed supremacy over princes in temporal matters as well and the struggle between Pope and Prince constituted one of the principle themes of the story of the Middle Ages.

The Protestant Theory—Erastianism

Under Protestantism the Royal Prerogative replaced papal supremacy. In England, King Henry VIII became the "Pope, the whole Pope and something more than the Pope". The Church became wholly riveted to the state and whatever rights it had came directly and solely from the state (*Rommen, The State in Catholic Thought,* pp. 544, 374, 420). Thus the Tudor State not only established the Anglican Church but determined its internal government, appointed its bishops, convened its religious assemblies, fixed its creed, compelled attedance at its Church, enacted compulsory tithes, outlawed the jurisdiction of the Pope ("The Bishop of Rome hath no jurisdiction in this realm of England", said an Elizabethan statute), prohibited all non-conformity, and made any ecclesiastical deviation a civil offense (Butt, *The American Tradition in Religion and Education,* pp. 14-15; Green, *Religion and the State,* pp. 1-23).

The paradox was that Protestantism was based on the right of private judgment in religion, but so strong was the tide of nascent nationalism, so overpowering the fear of Catholicism, that religious uniformity was deemed necessary to political unity; and, accordingly, the individual right of conscience was sacrificed. Religion was not a

private but a *community* concern and the subject had to adopt the religion of the sovereign: *Cujus regio, ejus religio* (Butt, *supra*, 14-15).

Orthodox Caesaro—Papism

The decay of the secular power of Rome increased the power of the Byzantine Emperor as head of the Roman Empire of the East. Here too, Church and State were united in a partnership to preserve the one true Orthodox faith and the one true Orthodox Church of the East. But here the Emperor remained the senior and dominant partner and the Church was subordinated to his authority. One of the Patriarchs put the matter thus: "It is not possible for a Christian to have the Church and not the emperor * * * and it is not possible to separate the one from the other" (Baron, *Modern Nationalism and Religion*, p. 167). The resulting relationship between them has been aptly described as "Orthodox Caesaro-Papism" (Baron, *supra*, Ch. VII, pp. 155-212).

The status of the Russian Church under the Czars was the most perfect expression of Caesaro-Papism. The Czar abolished the office of the Patriarch and became the secular head of the Church; he controlled the Holy Synod through his civil procurator; he appointed the bishops, including the archbishop of the American Archdiocese. The Church was financially supported by the state and the clergy became its paid officials. The Church was more than "loyal" to the Czar, it was part and parcel, one of the mainstays, of his regime. The Church demanded that "all ecclesiastical agencies bolster the old combination of autocracy, orthodoxy and nationality" (Baron, *supra*, p. 179). So intimate was the nexus between the Czar, the Church and Russian nationalism, that in the eyes of some students that Church for a time appeared to be nearer earth than heaven (Spinka, *The Church and The Russian Revolution*, pp. 1-10).

Church and State in the Colonies

The early colonists brought with them the religious practices of the mother country; they merely planted in new soil a branch of the old world tree. Thus, in Virginia the Anglican Church was established; in Massachusetts the Puritans founded their Bible society along Calvinistic theocratic lines. The other colonies varied in their religious practises between these two extremes, except Rhode Island, which was founded as "a shelter for persons distressed for conscience" (Green, *supra*, 23-47; Butt, *supra*, pp. 15-20).

The Separation Principle

The First Amendment repudiated and rejected the theories and practices of the State—Church relationship of the old world. It introduced a new and far reaching principle of complete religious liberty for the individual and complete separation of Church and State—of a free Church in a free State. Religion and its exercise was a matter of *personal*, not *state* concern. Churches, their internal government, their discipline, and their ecclesiastical affiliations, were subject only to canon law and were completely removed from the jurisdiction of the civil power. A Church was an autonomous society which the civil government could not control and in whose internal affairs it could not meddle. Church and religion were a sanctuary which the state could not enter. "Religion is wholly exempt from the authority of the Society at large" said Madison, one of the great architects of the First Amendment.

This complete separation of Church and State, this complete immunity from interference by the civil power in the internal discipline of churches and the exercise of their religion, is the cornerstone of our liberties. James Bryce has reminded us that half the wars of Europe, half the internal troubles that have vexed European States for

fifteen hundred years have arisen from the rival claims of Church and State and the attempts of one to control the other, but that this "whole vast chapter of debate and strife has remained virtually unopened in the United States"—thanks to the First Amendment (Bryce, *The American Commonwealth*, Vol. 2, p. 695). That Amendment has served the country well and a heavy responsibility rests on him, be he Judge or Legislator, who seeks to make the slightest breach in Jefferson's "wall of separation" between them.

Dissenting in *Everson* v. *Board of Education* (330 U. S. 1), Mr. Justice Jackson said that the guarantee of religious liberty "was first in the Bill of Rights because it was first in the fore-fathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the state's hands out of religion, but to keep religion's hands off the state * * *" (at p. 26).

In the great case of *Watson* v. *Jones* (13 Wall. 679), this Court laid down the fundamental principle, universally accepted in this country, that the canon law of an hierarchal Church, as pronounced by its chief authorities, is supreme in all matters affecting members of the faith and that the civil courts will accept the canon law as "final" and "binding" upon them (at p. 727), a rule that necessarily stems from the separation principle embodied in the Constitution. Dissenting here, Judge Desmond says that "*Watson* v. *Jones* (*supra*) does not use the precise word 'unconstitutional' but the opinion, contrasting American with old world systems (see p. 728 *et seq.* of 13 Wall (U. S.)), says that 'in this country the full and free right to entertain any religious belief, to practice any religious principle' finds expression in the American rule of law that the determinations of the tribunals and judicatories of a centrally—organized church are absolutely binding on the civil power." (293-4).

Pursuant to that principle, this Court in *Watson* v. *Jones* ruled that an incorporated parish church in Ken-

tucky remained subject to the jurisdiction of the central Presbyterian Church, against the claim of the southern branch of that church, which had seceded because of its dispute with the central church concerning slavery. The local state court had awarded the church to the seceders and its marshal was in actual possession thereof. This Court criticized the action of the state court as an interference in the internal affairs of the Church (at 732) and protected, by injunction, the exclusive right of the pastor, accredited by the central Church, to officiate and exercise there his ecclesiastical functions. *Watson* v. *Jones* is part of the Constitution.

Stemming from the holding in this case is the reminder of Mr. Justice Jackson in *Prince* v. *Massachusetts* (321 U. S. 158) that "Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be" (at 177).

Occupancy of St. Nicholas Cathedral by the archbishop appointed by the Patriarch is required by canon law and is an activity which concerns only members of the faith and ought to be free—as nearly absolutely free as anything can be. It is part of the sacramental system of the Church which is totally immune from regulation by the state.

If under the First Amendment the state has no power to compel a child to attend a public instead of a parochial school (*Meyers* v. *Nebraska,* 262 U. S. 390) or even to salute our flag in our public schools in the interest of patriotism but against his religious conviction (*West Virginia School Board of Education* v. *Barnette,* 319 U. S. 624), then surely it has no power to eject the canonical archbishop from a Cathedral reserved for him by canon law.

B. The Statute, by directing the transfer of Saint Nicholas Cathedral from the jurisdiction of the Patriarch to that of a locally elected archbishop and by requiring the ouster of the Patriarchal Archbishop from the Cathedral, which is reserved for his exclusive use by canon law, interferes in the internal affairs of the Russian Church, prohibits the free exercise of religion by that Church and violates the constitutional guarantee of religious liberty.

When we speak of the "statute" we refer, of course, to the statute as read by the majority below. That reading, Judge Desmond has pointed out, violates basic canons of construction, arbitrarily distorts it, contrary to its plain intent, and ascribes to it a "hidden" meaning. To be sure, the basic issue in this Court is not whether the majority below properly interpreted the statute, but, whether however arbitrarily construed, it meets the constitutional test. Nevertheless, the arbitrary *ad hoc* misreading of the statute in our case bears on its reasonableness and thus on its constitutional validity (cf. *Terre Haute, etc., Railroad Co.* v. *Indiana*, 194 U. S. 579).

As read below, the statute outlaws the patriarchal jurisdiction in New York state and commands that "every" Russian church in that state 'shall recognize and be and remain subject to the jurisdiction and authority of the * * * archbishop" elected by the metropolitan district. The sweep of this statute literally takes one's breath away. "The Patriarch of Moscow hath no jurisdiction in this Empire State of New York" is kin to the Elizabethan command that "The Bishop of Rome hath no jurisdiction in this realm of England." That is a command appropriate to a Tudor King, not to a modern legislature subject to the First Amendment.

Many believe, and with reason, that the metropolitan district lacks apostolic succession and has no canonical standing; indeed, the Patriarch has so ruled. The status

of Metropolitan Theophilus as a bishop is in doubt for his consecration was not authorized or confirmed by higher authority as required by canon law (26, 28, 165-6), and he is now under canonical suspension. That the metropolitan district itself felt and still feels an inner insecurity on that score, is shown by the memorandum, self-serving though it is, prepared by Professor Feodotov and his associates (242-7). That is why, in the hope of joining the Universal Church and acquiring apostolic succession, the metropolitan district had subjected itself to the Karlovitz Synod, on the theory that that body was a canonical hierarchy; but even that gossamer link (if it ever existed) with Universal Orthodoxy is now broken, and the metropolitan district is again in a canonical void. In these circumstances, for the civil power to direct all Russian Orthodox churches to "recognize" and subject themselves to the "jurisdiction" of a bishop and a district whose canonicity, whose apostolic succession, they may hold in doubt, is a grave intrusion into that field of conscience which is protected by the Constitution and the elementary decencies as well.

The majority below seek to blunt the rough impact of this statute on religious liberty by the euphemism that the statute does no more than "trace and identify, *as of to-day*," the metropolitan district as the "authentic group entitled to the administration" of the properties of the Russian Church (280-1, italics added).[12] The implication is that, as of tomorrow, the legislature may "identify" some other group as "authentic", and so on, thereby placing every religious society at the complete mercy of the state. May the state decide which religious group is "authentic"? Not under the First and Fourteenth Amendments.

Furthermore, the validity of a statute "must be tested by its operation and effect" (*Near* v. *Minnesota*, 283 U. S. 697, 708) and not by the gilded gloss put upon it. In *Marsh*

[12] We are not concerned with the right "to administer the properties" of the Russian Church, but *solely* with right of the appointed archbishop to occupy the Cathedral as required by canon law.

v. *Alabama*, 226 U. S. 501, a statute forbidding trespassing on private property—a matter of purely local concern—was held invalid when it was applied to bar the distribution of religious literature on such property in disregard of no trespass signs. A state may not regulate the use of real property in such a manner as to curtail the free exercise of religion (cf. *Shelley* v. *Kraemer*, 334 U. S. 1, 22). Concurring in the *Marsh* case, Mr. Justice Frankfurter said: "But when decisions by State courts involving local matters are so interwoven with the decision of the question of Constitutional rights, that one necessarily involves the other, State determination of local questions cannot control the Federal Constitutional right" (at 510).

The statute launches the most violent assault on religious liberty that has ever been attempted in this country since the adoption of the Constitution. It is absolutely unprecedented. For its like we must go back to the Middle Ages or the Tudor Kings. "No other decision reaching such a result can be found in the books" (287), rightly says Judge Desmond, dissenting here.

The conflict between this statute and the First Amendment is, we submit, clear beyond argument. The only remaining question is whether there is any justification for this breach of the constitutional guarantee.

C. There is no constitutional justification for the statute.

1. The statute cannot survive the clear and present danger test.

It is difficult to perceive how an exercise of religion can have that element of advocacy of more or less immediate illegal conduct which is given as the sole justification for restraints on speech under the clear and present danger test. In any event, possession of the Cathedral by the appointed archbishop affects only members of the faith and is not an exhortation to any action, let alone illegal

action; and the prohibition by statute of such possession cannot possibly be justified by any form of the clear and present danger rule heretofore employed.

2. The proffered justification for the statute, viz., that the Patriarchate is not a "true" Church, is inadmissible.

The majority below make no attempt to sustain the statute by the clear and present danger test. They tender as *sole* justification for the constitutionality of the statute the following theory: The Patriarch pledged "loyalty" to the Soviet government and demanded a like pledge from the clergy abroad (264-273). Therefore the Patriarchate is not a "true" religious body but a "tool" of that government (272, 284). This conclusion is "determinative" (272). We are to "presume" that the statute made a "determination" to this effect (281, 3, 4) and this "presumed determination" constitutionally justifies the suppression of the Patriarchate and the ouster from the Cathedral of the archbishop appointed by it.

Each of the postulates of this theory is wholly arbitrary and without a vestige of justification. Let us examine them.

3. There was no demand for a "pledge of loyalty" by the clergy *abroad* to the Soviet State.

Upon what ground do the majority assert that the Patriarchate is not a "true" Church? They point (a) to the imprisonment of the Patriarch—in 1923, (b) the emergence of the Living Church—which disappeared in 1925 (164, 42), and (c) the alleged "pledge of loyalty" to the Soviet state by the Patriarchate when it was restored in 1927 and its alleged demand for a similar pledge from the clergy *abroad* (273, 264). The first two claims border on the fantastic. Only the last claim need be considered.

There is no proof whatever to support the assertion of the majority that the Patriarch attempted to "exact" or promised to "secure" from the clergy *abroad* a pledge of loyalty to the Soviet state, let alone such a "written" pledge, as Judge Conway asserts (264). This is an arbitrary assertion without any factual support whatever in the record.

4. The alleged "pledge of loyalty" by Patriarch Sergius to the Soviet State in 1927 does not show that the Patriarchate is not a "true" Church.

Patriarch Sergius, we submit, was addressing the Russian clergy in 1927 when he spoke of "our sincere readiness to be fully law abiding citizens of the Soviet Union, loyal to its government, and definitely to hold ourselves aloof from all political parties or enterprises seeking to harm the Union" (207). At the same time he emphasized that "we cannot be silent about the contradiction which exists between us Orthodox and the Communist Bolsheviks who govern our Union" (207).

A student of church history will recognize this as a statement of the classic position of the Christian Church with respect to *any* political or economic system (Dunning, *History of Political Theories*, pp. 152-3). It is in full harmony with the recent pronouncement of Pope Pius, wherein he said that the Church "does not meddle in problems purely political or economic, nor does she deign to pass judgment upon the usefulness or the harm of one form of government or another" (New York Times, Feb. 21, 194[illegible], p. 3). The Patriarch had, at first, anathematized the revolution (201), but when the Soviets became the *de facto* government he could not reverse the verdict of history. All churches, [illegible] they must be "loyal" to the Caesar of the day, that is, the clergy must be law abiding citizens and not political revolutionaries; the Orthodox Christian will be "always and everywhere" an exemplary citizen of "any"

state "including that of the Soviets" (207)—or that of the Czars or that of the Mongol Khans. Christians are also citizens and must obey their rulers—even non-Christian rulers. "Obedience to the state was demanded (by the Church) as a religious obligation as well as a political necessity" (Gettell, *History of Political Thought*, p. 87; Rommen, *The State in Catholic Thought*, pp. 12, 583). We respectfully submit that the position of the Patriarchate is in full conformity with, indeed, is required by Christian tradition [18] and its condemnation on that score is, to say the least, uninformed.

Strong support for the Patriarch's position is found in a recent sermon on "God and Country" delivered in St. Patrick's Cathedral by Bishop Sheen, which is reported as follows in the New York Times, March 17, 1952, p. 15:

> "If I began preaching a revolution against the government of the United States, I would be suspended and silenced. Not because what I said was inopportune but because it is opposed to the spirit of America and the spirit of the Church * * *.
>
> The Roman Catholic Church has taught that the authority of civil government comes from God and therefore must be obeyed and * * * the Church would not countenance a revolt even against an atheistic, pagan or totalitarian government. If a persecution against us ever began in the United States, we would still be obliged to respect the government and not to revolt against it."

The Catholic Church in Italy, when Mussolini was in power, made a much stronger pledge of loyalty to the

[18] According to Metropolitan Benjamin, the policy of the Russian Church was that of "refraining from politics only * * * both in the Church and in the name of the Church" (114, 122), that "you may criticize the Soviet government, but only as private men" (123), and that this was "an expression of the Christian attitude to the government" (123). Appellee's counsel repeatedly called this a demand for a pledge of loyalty to the Soviet government, but appellants protested against such abuse of terms (121-3).

State. Article 20 of the Lateran Concordat between the Pope and Mussolini, as head of the State, executed in 1929, provides:

> "All bishops, before taking possession of their diocese, will take an oath of fealty to the Head of the State, according to the following formula: Before God and His Holy Gospel I swear and promise, as is fitting in a Bishop, fealty to the Italian State. I swear and promise to respect, and to make respected by my clergy, the King and the Government established according to the constitutional laws of the State. Further I swear and promise not to take part in any agreement, nor to be present at any meeting, which may injure the Italian State and public order, and that I will not permit my clergy to do so. Desirous of promoting the welfare and the interests of the Italian State I will seek to avoid any course that may injure it" (*Italy To-day*, 1929, N. Y. Public Library).

This is not offered by way of criticism. It would be presumption to do so, even by those outside the Church. The judgment of the Pope, as the guardian of the interests of his Church, is conclusive on all; and the Papacy was not, by this exercise of judgment, transformed from a "true" religious body into an agency of the Fascist state.

In brief, if by pledging loyalty to Caesar, a Church becomes Caesar's "tool", there is no "true" Church anywhere, for every Church of necessity pledges loyalty to him.

5. The "Contradiction" Between the Russian Church and the Soviet State.

But Patriarch Sergius did not merely pledge "loyalty" to the Soviet government. In the very same breath he asserted the independence of the Church. He said (207):

> "But let us be sincere to that end. We cannot be silent about the contradiction which exists between

> us Orthodox and the Communist Bolsheviks, who govern our Union. They set as their purpose struggle with God and His power in the hearts of the people. We on our part see the whole sense and whole aim of our existence in confession of faith in God and strengthening of the faith in the hearts of the people. They recognize only the materialistic interpretation of history, and we believe in the providence of God".

Further illumination on the relation between the Russian Church and the Soviet State is furnished by a statement of the Russian bishops, published about the time of Patriarch Sergius' pronouncement, which is reprinted in Anderson, *People, Church and State in Modern Russia*, pp. 89-94. A portion thereof, which we deem relevant here, is annexed hereto as Appendix B. It is a memorable document. The Russian bishops, having gone through fire, returned to first principles; their manifesto is a cry *de profundis*. They embrace the principle of complete separation of Church and State; and while they acknowledge the necessity of being "loyal" to the Caesar of the day—as all churches have been always and everywhere—they emphasize the basic "irreconcilability of the religious teaching of the Church with the materialism and the official philosophy of the Communistic Party and the government of the Soviet Republics directed by that party", and assert that, because of the "deep difference in fundamental principles separating the Church and State it becomes impossible that an inner nearness or reconciliation could exist between them" (pp. 67, 68, *infra*).

6. There is no evidence whatever in the record that the Patriarchate is not a "true" Church.

Appellee never raised this issue at the trial and none of its witnesses gave any testimony on that score. On the contrary, Professor Feodotov's memorandum acknowl-

edged the canonical continuity and the restoration of the full authority of the Patriarchate and urged reunion with that church (242-6, 106-7, 31). He accepted as correct the assertion of the Patriarch that "Our Russian Church has not been led astray. * * * It has kept unsullied its canonical consciousness and at the same time its correct and canonical supreme direction—that is, its part in the life of the Ecumenical Church and its right place in the harmony of the Orthodox Autocephalous Churches" (102-3, 104). In 1946, the metropolitan district itself resolved that "His Beatitude Alexy, Patriarch of Moscow and all Russia be requested to continue us in his fold and be our spiritual head" on terms of autonomy (222), and Metropolitan Gregory testified, without being cross-examined (167), that the Patriarchal Church "is functioning freely as an Orthodox Church, without interference by the civil authorities" (167). Appellee offered not a word of evidence to the contrary. To be sure, since the present status of the Patriarchate was not an issue at the trial, appellants' testimony on the subject is not as complete as it otherwise would have been. But it is the *only* testimony in the record on the point and there is literally nothing to contradict it. Indeed, the negotiations between the Patriarch and the metropolitan district for reunion, as the triers of the facts found, falsify any claim that the Patriarchate is not a "true" Church.

7. The Illegitimate Use of Judicial Notice.

In the face of the above testimony and the findings of the trial courts, the majority below base their conclusion that the Patriarchate is not a "true" Church on "judicial notice" of alleged historical facts (272-3). But a judge may not by judicial notice reach a conclusion contradicted by the record.

The Court of Appeals had no jurisdiction here to make new findings of fact[14] (New York Civil Practice Act, sec. 605) and we are not to assume that it exceeded its jurisdictional competence. In criticism of the postulate that the Patriarchate is not a "true" Church, the dissent below said that it "*amounts* to a new finding by this court, without evidentiary support in this record, and in the face of contrary testimony, and express contrary findings by both courts below" and that it is an "*attempted* determination of a fact, vigorously denied by witnesses, and found to the contrary by the courts which have jurisdiction to pass on facts" (288, 289, italics added). In these circumstances, a decision against appellants based on "judicial notice" of alleged facts contrary to the record is, we submit, a decision by prejudice in defiance of evidence.

8. The Illegitimate Use of Presumption.

Not having the facts to support them, the majority resort to presumption. In their view, the legislature "concluded" that the Patriarchate is not a "true religious body" but a "tool" of the Soviet government (284), that this "must be deemed to have been found" by the legislature (283, 281) and that Article 5-C made a "determination" to this effect (281).

But we search the statute in vain for the slightest evidence of such a "determination". It simply isn't there. The majority below find in the statute what they themselves put there in the first place. They see what they want to see.

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[14] According to Judge Conway (262) the Court of Appeals affirmed the *Kedrovsky* decision on this ground, viz., that since there was sufficient evidence to sustain the findings of the Appellate Division, the Court of Appeals was bound to affirm. But, in addition, the Court there, like *Watson* v. *Jones*, sustained the supremacy of the canon law and affirmed the judgment which enjoined interference by Platon with occupancy of the Cathedral by the appointed archbishop.

But such a "presumption" has not the slightest basis in fact and is wholly arbitrary.[15] The statute contains no declaration of policy or findings of fact; there were no hearings or committee reports on it. It was passed in 1945, just two years after the legislature had designated the Patriarchate as one of the four "primary" Orthodox jurisdictions in the state and Governor Dewey had proclaimed Metropolitan Benjamin as the living successor to the early Russian bishops who had founded the American Diocese; when the metropolitan district was still subject to the Karlovitz Synod, whereas the Patriarch had rallied the Russian people against Hitler; and when the Soviet government was still our military ally.

Against this background, even an *express* legislative determination that the Patriarchate was not a "true" Church would have been arbitrary in the extreme, let alone a "presumption" to that effect, which in these circumstances can be nothing more than an expression of a prejudice.

If such use of "presumption" is permitted no statute is safe, for a judge would then be free to read into a statute anything he desires; and we would be governed not be statutes but by the prejudices of judges.

Presumptions may have a legitimate role in dealing with statutes affecting commercial activities (*United States* v. *Carolene Products Co.*, 304 U. S. 144), but they will not suffice in legislation restricting the freedoms of the First Amendment, particularly religious freedom (*West Virginia School Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Thomas* v. *Collins*, 323 U. S. 516, 530). The command of the First Amendment that there shall

[15] Equally arbitrary is the somewhat different presumption appellee invoked on the previous argument here, viz., that the statute made a "determination" that there was a "likelihood" that the Patriarchate would be used for Soviet propaganda in this country. This emphasizes the danger of resort to this dubious device: each one fashions his own presumption *ad hoc*.

be "no law * * * prohibiting the free exercise" of religion is, as Mr. Justice Jackson said, "set forth in absolute terms". Of necessity this freedom is "presumed to be invulnerable" and any attempt to curtail it by statute "is *prima facie* invalid". (Mr. Justice Murphy, dissenting in *Prince v. Massachusetts*, 321 U. S. 158, 173). In other words, the presumption is *against* the validity of such a statute and the burden of proving the necessary supporting facts is cast upon him who seeks to sustain it (*Busey* v. *District of Columbia*, 138 Fed (2) 592, 595). And that burden can be met only by satisfying the clear and present danger test.

9. Reductio ad Absurdum

As we have seen, the foundation of the position of the majority below is the alleged statutory "determination" that the Patriarchate is not a "true" Church. At the same time Judge Conway reads into the statute the limitation—as arbitrary as his initial construction thereof—that it presses into the compulsory jurisdictional embrace of the metropolitan district *only* those patriarchal churches which were established *prior* to 1924—leaving those established *after* 1924 free to adhere to this "tool" of the Soviets (272, 6, 9). The view of Judge Van Voorhis, who invented this theory, was that the statute suppressed the Patriarchal Church in its entirety. However erroneous that position is, it is, at any rate, consistent. If the Patriarch is an agency of the Soviet government, his theory calls for the extirpation of the Patriarchal Church root and branch. But Judge Conway, who adopted this theory, reads into the statute a limitation that reduces it to an absurdity. For its defies understanding why, if the Patriarchate is not a "true" religious body but a "tool" of the Soviet government, the statute suppresses only those of its churches, (and only those of its *incorporated* churches, at that), which happened to have been established *prior* to 1924.

10. The alleged status of the Patriarchate cannot justify restraints on religious liberty.

Neither the legislature nor our courts have the power to pass upon the propriety of the policies or the acts of the Patriarch; they have "no power or right to adjudicate that the incumbent is no true Patriarch * * * The Patriarch, like all men, must account for his stewardship, but not to the New York courts" (289).

The state has no power to suppress a Church because it disapproves of the political views of the head of that Church or his relation to the Caesar under whom he lives. The Constitution does not authorize restraints on churches on any such grounds. The Tudor Kings suppressed the Catholic Church but our legislatures do not have the like power to suppress the Patriarchal Church. The First Amendment forbids.

POINT II

The statute, as construed and applied by the Court of Appeals, is a taking of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

The Cathedral was built and maintained by the Mother Church with its money for the use of its Archbishop. From the very beginning it has so been used. The Mother Church has (apart from its religious and canonical interest) a vested *property* interest in the Cathedral and its use by it and its archbishop as his *residence* and as the headquarters of the diocese. Extinction of that interest and denial of such use by statute or by judicial decision on common law grounds, would be an unconstitutional deprivation of a vested property right.

POINT III

The ruling by the Court of Appeals that the Trial Court has "discretion" to determine whether appellant Benjamin is the "proper person" or "proper trustee" to occupy St. Nicholas Cathedral, violates the guarantee of religious freedom.

If appellee is entitled to the Cathedral by force of the statute and if it is constitutional the above argument becomes academic.

But even if the statute is void, the above disposition of the case on common law lines would violate the constitutional guarantee of religious liberty. A judicial decision no less than an act of legislation which invades protected religious liberty is invalid. See *Shelley* v. *Kraemer*, 334 U. S. 1; *Backus* v. *Fort Street Union Depot*, 169 U. S. 557; *Brinkerhoff* v. *Hill*, 281 U. S. 673; *Chicago, B. & O. R. R.* v. *Chicago*, 166 U. S. 226.

The Court of Appeals ruled that, apart from the statute, the judgment in favor of appellants would have been reversed on common law grounds and a new trial ordered, with a direction that the trial court "exercise its discretion along the lines herein indicated," i. e., to determine whether Benjamin or Theophilus was the "proper trustee" who would carry out "more faithfully" the Cathedral "trust" (274).

But the civil courts have no such discretion. If the canonical archbishop is denied the right to occupy the Cathedral as a matter of discretion, there is as much an interference with an exercise of religion and a violation of the constitutional guarantee as when the same result is reached by legislative command. Canon law determines who is the proper occupant of the Cathedral—here Metropolitan Benjamin—and the civil courts have no discretion to contradict the canon law and select another in his place.

Because the ruling that such discretion exists in the civil courts is coupled with a direction for a new trial, it may lack the requisite finality for present review by this Court and it may be necessary to await the actual adverse exercise of such discretion on a new trial before it can be challenged here (*Cincinnati St. R. R. Co.* v. *Snell*, 179 U. S. 395; *Laclede Gas Light Co.* v. *Public Service Comm.*, 304 U. S. 398). But since it may be urged that such a ruling is itself a challengeable violation of the constitutional guarantee, we consider the issue on the merits.

a) The "discretion" theory of the majority, if applied to this case, is unconstitutional.

The majority below rest exclusively on *Kedrovsky* v. *Archbishop and Consistory of the Russian Catholic Church*, 249 N. Y. 75, as authority for the power of the civil courts to exercise their "discretion" to bar the appointed archbishop from the Cathedral and to select another in his place (271-2), but that case is irrelevant, and if it is deemed to advance such a doctrine, it is unconstitutional.

Unfortunately, the facts are not stated in the opinion, but the record there shows that after Evdokim left the United States in 1917, one, Alexander, assumed the role of acting archbishop. Title to about 100 Russian parish churches was transferred in his name. Unfortunately, Alexander placed mortgages on some of these parish properties and used the proceeds thereof and other parish property for his private business ventures, such as the promotion of motion picture enterprises, the purchase of apartment houses, etc.

In 1918, Kedrovsky brought a representative class action on behalf of himself and others similarly situated, alleging waste by Alexander and his associates of the above parish properties. Kedrovsky was not then, did not claim to be, and did not sue in the capacity of archbishop. He also alleged that a corporation known as Archbishop and Consistory of the Russian Orthodox Greek Catholic Church,

which he joined as a defendant in the action and which will hereafter be referred to as the Consistory Corporation, was the successor of a similarly named unincorporated association; that the latter had been the "owner" of the above parish churches, and that the Consistory Corporation had become the "owner" thereof by statutory succession. The relief sought was the appointment of a receiver, an accounting by Alexander, an injunction restraining him from further waste and a transfer of the titles of the parish properties from Alexander to the Consistory Corporation. A receiver was appointed and, pending the receivership, Alexander transferred the titles to a Board of Trustees, composed of Platon and others who later became the leaders of the metropolitan district.

Alexander's malfeasance was established and the lower court directed the titles to be conveyed, *via* the receiver, to the Consistory Corporation of which Kedrovsky in the meantime had become president.

The Court of Appeals reversed (249 N. Y. 75) on the ground that the Consistory Corporation did not have and had no right to the titles of the parish churches and that the transfer of these titles to it had been ordered on the "erroneous assumption that deeds to the corporation are nothing more than further assurance of a title already held" (at p. 76). Since the titles were nominally in Alexander, who had been adjudged derelict, or in the Board of Trustees, his grantees, who had taken *pendente lite*, the Court of Appeals had no alternative but to remit the case to the trial court to place the titles in the hands of others who would more "faithfully", that is, more honestly than Alexander, hold the titles for the use of the respective parishes.

Carrier v. *Carrier* (226 N. Y. 114), the sole authority cited in the *Consistory* opinion, reveals the limited nature of that decision. There, a husband executed a trust agreement under which he created a trust fund, consisting of real and personal property, for the benefit of his wife and

children. Thereafter the husband threatened to convert the trust assets to his personal use and, on application of the wife, the Court restrained such breach of trust and said that it had the power to remove trustees for dishonesty, insolvency or breach of trust (at 225).

St. Nicholas Cathedral was *not* one of the properties involved in the suit, nor was there any issue as to the undoubted right of the appointed archbishop to occupy it under canon law, which is the *sole* issue here and was the *sole* issue in the *Kedrovsky* case. None of the *ecclesiastical* rights or prerogatives of Alexander, as archbishop, assuming he was one, and no issues as to the exercise of his religion, were in any way involved, affected or limited by the *Consistory* decision.

The *Consistory* case thus has no point of contact whatever with the *Kedrovsky* decision, which rests solidly on the principles of *Watson* v. *Jones;* and far from casting doubt on the validity of that decision, as Judge Conway now intimates (263), the *Consistory* opinion refers to Kedrovsky as the "present archbishop" (at 76).

A civil tribunal may have supervisory power over recreant and dishonest trustees and may remove them for breach of trust; indeed, the state may punish an archbishop for his infraction of the civil or criminal law, but it has no power on that account or for any other reason, to remove an archbishop from his office, to oust him from his diocesan Cathedral, to strip him of his ecclesiastical prerogatives, to prevent him from performing his ecclesiastical duties or exercising his religion under the canon law of his church. This the First Amendment forbids.

A state may not under the guise of regulating the use of real property by trustees or others violate the First and Fourteenth Amendments (*Shelley* v. *Kraemer, supra,* at 22; *Marsh* v. *Alabama, supra*).

The "trustee" theory formulated by Judge Conway is literally based on a play on words. By the simple device of calling an archbishop a "trustee", he strips him of his

ecclesiastical prerogatives and imposes upon him burdens incident to a secular status. And, to use terms inappropriate here, he transmutes Metropolitan Benjamin from a "beneficiary" entitled to protection into an involuntary "trustee" subject to removal. Here is an application of that sterile mechanical jurisprudence which adjudicates ecclesiastical rights, not on the basis of actual canonical relations, but on the basis of rubrics and labels arbitrarily imposed. The power of the civil courts to deal with dishonest men does not enable them to prevent archbishops from exercising their religion or to violate the guarantees of religious liberty.

b) The Role of Title in The Case

Title to the Cathedral was taken in the name of a corporation of which the Russian Ambassador and the Consul General were the sole trustees (71-2, 229).[16] That corporation, in 1916, transferred the deed to Archbishop Evdokim. The petition for leave to make this transfer stated that the corporation merely held the nominal "title" and that the Cathedral was under the management and control of the appointed archbishop "subject always to the superior control of the Most Holy Synod of Petrograd, Russia" (233). Evdokim, in 1917, retransferred the deed to the grantor which, in 1925, gave the "title" to appellee (71-2,3), which gave nothing for the deed and since 1926 contributed nothing for its maintenance (160, 173). The *locus* of the title played no role in Judge Conway's decision (270). The right to occupy the Cathedral stems from canon law and not from the holder of the "title", who or which holds it subject to that law (*Watson* v. *Jones,* at 720-2). Just as Evdokim could not have been ousted by appellee's grantor, so his successor, Benjamin, may not be ousted by appellee.

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[16] There is no evidence whatever to support the assertion of Judge Conway that this corporation was the incorporation of a brotherhood organized in 1893 (253).

The fact that appellee is a corporation is a fortuitous circumstance and should not affect the merits of the case. The ecclesiastical issue would be the same, if the title were in an individual, such as the archbishop, as it was during 1916 and 1917.

No case has held or constitutionally can hold that because the "title" to the premises happens to be held by a corporation, it or its trustees may oust the canonical archbishop from a diocesan Cathedral of an hierarchal Church against the authority of the head of the Church (*Watson* v. *Jones*).

POINT IV

This Court has jurisdiction of the appeal. A federal question was involved and necessarily decided. The judgment does not rest and cannot be sustained on state grounds beyond the power of this Court to review.

A careful study of the opinions in the Court of Appeals (252-297) and of its remittitur as amended (298), leads to the conclusion that the decision did not rest on any "state ground".

At the outset it should be borne in mind that at the trial appellee's complaint was dismissed on the merits (192 Misc. 327) and that this dismissal was affirmed, though by a divided Court, in the Appellate Division (276 App. Div. 309).

Those determinations involved findings of fact as to the status of Metropolitan Benjamin and conclusions of law as to the power of the courts to deal with religious controversies and the meaning, effect and constitutionality of Article 5-C of the Religious Corporations Law.

Under New York law the power of the Court of Appeals in review of an affirmance by the Appellate Division is restricted to questions of law; it cannot make new find-

ings of fact (Civil Practice Act, Sec. 605; *Angelos* v. *Meserich*, 289 N. Y. 498). Moreover, the Court of Appeals is not vested with discretion (*Matter of Droege*, 197 N. Y. 44).

Consonant with this well settled practice the Court of Appeals had three courses open to it: it could have affirmed, ordered a new trial or, as it actually did, reverse and enter judgment for the hitherto unsuccessful party, appellee here (C. P. A. § 584).

The Court of Appeals did not affirm because the majority of the Court believed that legal error had been committed by the lower courts. These were of various kinds and colored the form of action taken. Thus, the majority concluded that the trial court should have passed on the status of the Patriarchate in Russia and determined in their discretion whether or not Benjamin was the proper person or a sufficiently "faithful" trustee to administer the Cathedral. But since that determination was one of fact, Judge Conway noted that were this view to prevail it would be necessary to remand the case to the state trial court for a new trial.[17]

But the Court of Appeals did not proceed in that manner—and, of course, if it had done so, consideration of the issues by this Court might have been postponed until after a new adverse final judgment in the state courts in the new trial had been reviewed to the allowable limits.

Instead, the Court of Appeals reversed and awarded final judgment for appellee, not for any factual reasons, which were beyond its competence, but solely because of its construction of the New York statute and its holding that it was constitutional, as construed. This was recognized by appellee in its brief at page 109 where it said: "The

[17] It may be noted, however, that even such a decision would not have rested on an adequate state ground since it would have proceeded on the assumption that state courts, contrary to the views expressed by this Court in *Watson* v. *Jones*, had the power to pass on the religious questions here involved (see pp. 47-50, *supra*).

decision appealed from was based on the statute". Had this not been so, appellee noted, a new trial would have been necessary.

That this is so appears also from Judge Conway's statement that it was "unnecessary" further to discuss the factual issues already referred to "for there is another ground requiring reversal here and judgment in favor of plaintiff" (275). That other ground is the action taken by the legislature in 1945 and 1948 which, he said, was "conclusive" (271) and completely eliminated any doubt as to the proper determination of the case "along common-law lines."

Judge Froessel in concurrence did not attempt to separate the impact of the facts and of the legislative action (285). But he expressly concurred in the opinion of Judge Conway, which he described as the "prevailing opinion" (285). While the dissenting judges criticized both the "attempted" new finding (288, 289) by the Court of Appeals and the Court's power to make it, they pointed out that the subject matter was an ecclesiastical one beyond the competence of the civil courts. They were clear in their view that the majority decision was based on the statute, that the majority holding was that the legislature had the power, and "has exercised the power", to oust the canonical archbishop from the Cathedral and they dissented because they "strongly" felt that such a statute violated the First Amendment and *Watson* v. *Jones* (286-7).

Finally the whole Court certified not only that the federal issue had been presented to it, but that it had "necessarily" passed on it (298).

The decision of the Court of Appeals which resulted in the final judgment now under review by this Court rested, therefore, *solely* on its interpretation and application of this statute, Article 5-C. Accordingly, the status of the Patriarchate in Russia, with which this Court was concerned in its order of June 9, 1952, was not and could not, under state practice, have been the basis for the decision

by the Court of Appeals awarding final judgment to appellee. Had that status been the determining factor of the Court of Appeals' dissatisfaction with the decisions of the lower state courts, it would, as Judge Conway said, have necessitated "the ordering of a new trial so that the Supreme Court might exercise its discretion along the lines herein indicated" (274).

An examination of pertinent decisions by this Court indicates that such a statement by the highest state court is considered to have controlling influence in determining whether or not its decision rested on a federal question.

Where there is doubt as to whether the decision rested on federal or state grounds, the current practice of this Court is (a) to vacate the judgment and remand the case to the state court (*Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437; *Jennings* v. *Illinois*, 342 U. S. 104; *State Tax Commision* v. *Van Cott*, 306 U. S. 511; *Villa* v. *Van Schaick*, 299 U. S. 152), or (b) to continue the cause for the purpose of procuring from the state court its certificate or other expression "as to whether the judgment * * * was intended to rest on an adequate independent state ground or whether decision of the federal claim was necessary to the judgment rendered" (*Dixon* v. *Duffy*, 342 U. S. 33, 34; *Hammerstein* v. *Superior Court*, 340 U. S. 622; *Herb* v. *Pitcairn*, 324 U. S. 117; *Loftus* v. *Illinois*, 334 U. S. 804).

And the certificate or other expression of the state court that it intended to decide and necessarily decided a federal question, is sufficient to give this Court jurisdiction (*Indiana* v. *Brand*, 303 U. S. 95, 98; *Whitney* v. *California*, 274 U. S. 357, 361; *Cincinnati etc., Packet Co.* v. *Bay*, 200 U. S. 179; *Marvin* v. *Trout*, 199 U. S. 212). This is necessarily so, for this Court is hardly in a position to repudiate the assertion of the state court of its intention. Propriety requires, as this Court has said, that state courts "be asked rather than told what they have intended" (*Herb* v. *Pitcairn*, *supra*, at 128).

Here the Court of Appeals, in its amended remittitur, stated expressly that on the appeal before it "there was presented and necessarily passed upon" the constitutional question whether Article 5-C violated the First and Fourteenth Amendments and that that court held that it did not. The jurisdiction of this Court is thus unescapable.

In the *Perkins* case the decision below rested on a clear state ground but, because this Court felt that the constitutional issue discussed in the dissent of a single judge "may have influenced" the decision, it ordered vacatur and remand (at 449). And in other cases, even though the decisions rested on clear state grounds, this Court took jurisdiction because it felt the state decision was influenced by the federal issue (*Terre Haute, etc., Railroad Co.* v. *Indiana*, 194 U. S. 579, 589) or the federal right was violated in "substance and effect" (*Ward* v. *Board of Community Consumers*, 253 U. S. 17, 22).

And in another instance, even though the decision rested on a state ground, this Court continued the cause because it could also be said that it rested alternatively, "either necessarily" or "hypothetically", on a federal ground (*Herb* v. *Pitcairn, supra*, at 124-5).

It may be observed that in no recent instance has this Court refused to take jurisdiction on the ground that the decision rested on an adequate non-federal basis except where the wrong practice had been followed in the state courts (see *Woods* v. *Nierstheimer*, 328 U. S. 211; *Phyle* v. *Duffy*, 334 U. S. 431; *Hedgebeth* v. *Northcawler*, 334 U. S. 806).

And of course the state ground must be substantial, fully adequate and broad enough to sustain the judgment and wholly independent of the federal question (*Lawrence* v. *State Tax Commission*, 286 U. S. 276; *Abie State Bank* v. *Bryan*, 282 U. S. 765; *Union Pacific Railroad Co.* v. *Public Service Commission*, 248 U. S. 67).

The majority opinion does not *purport* to rest its decision on state grounds to the exclusion of the constitutional

issue. In such case, speculation as to the state grounds on which the decision *might* or *could* have been based, will not defeat the jurisdiction of this Court (*International Shoe and Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 666; *Grayson* v. *Harris*, 267 U. S. 352, 358; *Indiana* v. *Brand*, 303 U. S. 95, 98).

Indeed it is impossible to conceive how, in the case at bar, it could be determined that there was a non-federal ground adequate to support the judgment. For, as we have pointed out, Judge Conway recognized that if the statute had not been controlling, the Court of Appeals would not have given judgment in favor of appellee, but would have ordered a new trial, so that the court of first instance might explore the facts further and exercise the necessary discretion vested in it alone in its dealing with trustees. Under such circumstances the jurisdiction of this Court to review the federal question has long been recognized. See *Lawrence* v. *State Tax Comm.*, 286 U. S. 276; *Williams* v. *Kaiser*, 323 U. S. 471.

On the basis, therefore, of Judge Conway's majority opinion and the statement in the amended remittitur, it is evident that the judgment here under review rested *only* on a holding that the statute was valid against a challenge that it violated the First and Fourteenth Amendments. The jurisdiction of this Court is clear. It *must* pass on the constitutionality of the statute.

Even on the basis of Judge Froessel's opinion (although it really was but supplemental in nature), the same result would follow. For that opinion made no attempt to separate the common law and statutory grounds for the conclusion reached. Both were referred to in a single sentence. The issues are, therefore, "entangled" or "interwoven" in such a way that the federal issue must be resolved by this Court (*Abie State Bank* v. *Bryan*, *supra*, at 773; *State Tax Commission* v. *Van Cott*, *supra*, at 514; *Enterprise Irrigation District* v. *Farmer's Mutual Canal Co.*, 243 U. S. 157,

164; *Marsh* v. *Alabama, supra,* Frankfurter, J., concurring, at 510).

Finally, as we have already observed, even if the case hinged only on non-statutory grounds, a federal issue concerning the power of a state to deal with the kind of religious question here involved was presented (*Watson* v. *Jones, supra*).

a) This Court Has Jurisdiction to Review the Facts

Appellants do not ask this Court to resolve conflicts in evidence. There are none. The basic facts are not in dispute.

"And this Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts" (*Fiske* v. *Kansas,* 274 U. S. 380, 385). See also *Cresswell* v. *Grand Lodge Knights of Pythias,* 225 U. S. 246, 261; *Sterling* v. *Constantin,* 287 U. S. 378, 398). To vindicate the federal right this Court will review even *disputed* facts. Thus in *Union Pacific R. R.* v. *Pub. Service Com.,* 248 U. S. 67, this Court said that "it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived" (at 69-70).

And in *Feiner* v. *United States,* 340 U. S. 315, Chief Justice Vinson said: "In the review of state decisions where First Amendment rights are drawn in question, we, of course, make an examination of the evidence to ascertain independently whether the right has been violated" (at 316). See also *Niemotko* v. *Maryland,* 340 U. S. 268, 270; *Watts* v. *Indiana,* 338 U. S. 49, 51.

POINT V

The judgment violates procedural due process.

Apart from its invalidity as a restraint on the free exercise of religion, the judgment also violates procedural due process in the following respects.

a) The failure and refusal of the Court of Appeals to rule on the merits of appellant Benjamin's defense of limitations, while directing final judgment against him, violates due process. Title to the Cathedral was given to appellee in 1925 (204). Its possession terminated April 2, 1926 (23-4). This action was commenced April 9, 1945 (67). During these intervening 19 years appellee was continuously out of possession and made no attempt to recover the Cathedral (4, 160). Ejectment is governed by the 15 year statute of limitations (New York Civil Practice Act, sec. 34), which Benjamin pleaded (4, 161). The defense is valid on its face and this action is barred.

At the trial (67-8, 70, 78-80) and on its appeal in the courts below, appellee's *sole* (68) contention was that the statute had been tolled, i.e. the "commencement" of this action had been "stayed" (New York Civil Practice Act, sec. 24) by two injunctions: (a) an alleged unsigned *temporary* injunction, claimed to have been issued in 1926, which lapsed with the main action (67), and which the trial court excluded (80); and (b) the permanent injunction issued in the *Kedrovsky* trial in 1926. But appellee was not a party to that suit, and, in any event, it enjoined only "physical" interference with Kedrovsky's possession and did not bar summary proceedings, as appellee admitted (249) or ejectment.

The lower courts did not rule on this defense, but since they held in Benjamin's favor, it was unnecesasry for them to do so. But when the Court of Appeals rendered *final* judgment *against* this appellant, it was bound to pass on

his defense on the merits and its failure to do so is a denial of due process.

The Court of Appeals summarily dismissed this defense of limitations by saying that it was "either ignored, abandoned or found in plaintiff's favor" and has "been effectively eliminated from the case" (271).

The above statement flatly contradicts the indisputable facts. This defense was *not* "ignored, abandoned or found in plaintiff's favor". It was pleaded, it was litigated at the trial, it was pressed on the appeals to both courts below and the quoted statement is plainly mistaken.

A *fair* hearing is of the essence of due process (see *Rochin* v. *California*, 342 U. S. 165). Failure or refusal to pass on a properly raised defense denies a defendant the right to defend and deprives him of a fair hearing and thus denies him due process of law. If the right to be heard by *oral* argument is a requisite of a fair hearing (*Federal Communications Commission* v. *W. J. R.*, 337 U. S. 265, 273-7), all the more is a decision on the merits of any properly raised defense such a prerequisite. Here appellant Benjamin received from the Court of Appeals no hearing whatever, let alone a *fair* hearing, with respect to his defense of limitations.

(b) The use of the Kedrovsky record as a basis of the decision against appellants, violates due process. The majority purport to base their decision against appellants on the "evidence in the records before us" (272). The reference is to the record here and to the *Kedrovsky* record whose contents were deemed "vital to our inquiry" (253). Use of this record is sought to be justified on the ground that "it was submitted to us on the argument" (253). But this record was *not* submitted to and was not properly *before* the court below. Plaintiff's Exhibit 6A, 18 and 18A (dealing with portions of the Sobor of 1923 and Kedrovsky's appointment then), were not printed here (189, 221, 54, 155) and it was stipulated that

"with respect to Plaintiff's Exhibit 6A, 18 and 18A, the Court may be referred to copies of said exhibits appearing in the printed case on appeal" in the *Kedrovsky* record (251). Accordingly, on the argument below, appellee's counsel delivered to the Court for its convenience several copies of that record to enable the judges to have readily at hand the above three exhibits. Of course, the entire *Kedrovsky* record was not thereby "submitted" to, or placed "before" the Court, for its use and consideration as part of the evidence in the case at bar, certainly not by appellants. The *Kedrovsky* record was *not* "submitted" to, or placed "before" the Trial Court and it is not before this Court.

Of course, appellants had no opportunity to cross-examine the witnesses in the *Kedrovsky* trial or otherwise to controvert their evidence there.

Nor is that all. Judge Conway adopts and bases his decision on the self-serving claims and that version of events (not contained in our record), which were offered by the *defeated* defendants in the *Kedrovsky* trial (257-8, 260) and which were *rejected* by the Appellate Division in that case, which made contrary findings favorable to Kedrovsky (214 App. Div. at 489). In these circumstances, to base a decision adverse to appellants on evidence, deemed "vital" to the decision, found in another case not before the Court, and particularly on testimony in that case which had been rejected by the triers of the facts there, and which appellants here had no opportunity to controvert, is to violate due process.

(c) The "determinative" ground of the decision against appellants was the conclusion that the Patriarchate was not a "true" Church. But this issue was never raised at the trial, appellants were not given notice of it, and did not have a full opportunity to meet it. To decide a case on a "determinative" issue never tendered at the trial, violates due process.

(d) To decide a case on the basis of judicial notice of alleged facts, in defiance of contrary evidence in the record and contrary findings of the triers of the facts, violates due process.

Conclusion

Judge Conway's decision aims at Communism and strikes at the Russian Church. A comment in the Harvard Law Review sees in the decision "merely an indirect means of achieving an unconstitutional interference with religious freedom tacitly justified by a distaste for Communism" (64 Harv. L. Rev., 1361).

We yield to none in our opposition to Communism. The democratic world cannot be indifferent to Communism's challenge to its basic values, values which are derived from Judeo-Christian civilization and which center about the sanctity of the human spirit and the freedom of the mind. Upon that issue is there any doubt where the Russian Church stands? Patriarch Sergius emphasized the "contradiction", and the Russian bishops the "irreconcilability", between the Church and Communism. The Russian Church has kept "unsullied its canonical consciousness". It "desires to be, and feels itself to be the Church of the Russian *people*, not the Church of the Soviet *State*" (Anderson, *People, Church and State in Modern Russia*, p. 214, italics added). It is the guardian of a faith which "is impelled by forces and governed by laws of its own which not even the Kremlin understands" (Smith, *My Three Years in Moscow*, p. 279); and a danger to the Russian Church is its isolation from the West (Smith, *supra*, pp. 264-5). We submit that the decision below goes far out of its way to minister to that danger.

We have been told that our basic liberties are safe while this Court sits. Here is an opportunity for this Court to reject this resurrection of the power of the state over

churches and religion, exercised by the Tudor Kings in the past and by the totalitarians of today, and to proclaim anew the great principle, that in a democratic society governed by the First Amendment, every Church, the Russian Church included, is free to exercise its religion without dictation from Caesar.

The judgment should be reversed.

Respectfully submitted,

PHILIP ADLER,
Attorney for Appellants.

APPENDIX A

ARTICLE 5-C (New)

Russian Orthodox Churches

Sec.

105. Definitions.

106. Incorporation of Russian Orthodox churches.

107. Government of incorporated Russian Orthodox churches; powers and duties of trustees.

108. Reincorporation of existing corporations.

Article added by L. 1945, c. 693, eff. April 10, 1945.

§ 105. Definitions

The "Russian Church in America", *as that term is used anywhere in this article, refers to* [is] that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and [Alaska] *the Aleutian Islands (or Alaska)* of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since

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Explanation—The amendment of 1948 added the words in italics and omitted the words in brackets.

in or about nineteen hundred twenty-four; and were subject to the *administrative* jurisdiction of the Most Sacred *Governing* Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an *administratively* autonomous metropolitan district *created* pursuant to resolutions adopted at a general convention (sobor) of said district held in Detroit, Michigan, on or about or between April second to fourth, ninteen hundred twenty-four.

A "Russian Orthodox [Church] church", *as that term is used anywhere in this article,* is a church, cathedral, chapel, congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the *administrative* jurisdiction of *said mission, diocese or autonomous metropolitan district hereinabove defined as* the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, § 1, eff. March 31, 1948.

§ 106. Incorporation of Russian Orthodox Churches

An unincorporated Russian Orthodox church in this state may be incorporated by executing, acknowledging and filing a certificate of incorporation, stating the corporate name by which such church shall be known and the county, town, city or village where its principal place of worship is or is intended to be located. There shall be attached to such certificate the permission to incorporate signed by the metropolitan archbishop or other primate or hierarch of the Russian Church in America, or by the locum tenens acting in his place. Such certificate of incorporation shall be executed and acknowledged by six lay members of such church.

On filing such certificate such church shall be a corporation by the name stated in the certificate. Added L. 1945, c. 693, eff. April 10, 1945.

§ 107. Government of incorporated Russian Orthodox [Church] *churches;* powers and duties of trustees

1. Every Russian Orthodox church in this state, whether [heretofore or hereafter] incorporated *before or after the creation of said autonomous metropolitan district,* and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian [Orthodox] Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian [Orthodox] Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church).

2. The six lay members of every church incorporated pursuant to this article signing the certificate of incorporation and the rector shall be the trustees of such church for the first year or until their successors are selected according to the by-laws of such church or the rules and usage of the Russian [Orthodox] Church in America.

3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal

statutes for parishes of the Russian [Orthodox] Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November twentieth to twenty-third, ninteen hundred thirty-four and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711 § 2, eff. March 31, 1948.

§ 108. Reincorporation of existing corporations

Any heretofore incorporated Russian Orthodox church may reincorporate under the provisions of this article, by filing in the office of the county clerk in the county in which its principal place of worship is located, a certificate, signed by the trustees in office at the time of such reincorporation, or by the majority of them, setting forth that they desire to reincorporate under the provisions of this article, the corporate name by which such church shall be known, the county, town, city or village where its principal place of worship is located and the number and the names of the trustees who are to hold office until the next annual meeting of said church. Immediately upon the filing of such certificate all the right, title, equity and interest of such church in any estate, real or personal, together with all franchise and charter rights, shall be vested in the body corporate and politic so created under this article and the original incorporation of such church shall be null and void. Added L. 1945, c. 693, eff. April 10, 1945.

APPENDIX B

Statement of the Russian Bishops quoted in Anderson, *People, Church and State in Modern Russia*, pp. 91-94.

"Those who have signed the present statement are fully aware of the difficulty of establishing mutual friendly relations between the Church and State under present actual conditions. They cannot be silent regarding this. It would not be true, it would be beneath the dignity of the Church, and besides it would be quite useless and unconvincing to assert that there were no points of discord between the Orthodox Church and the State authority of the Soviet Republic. But these points of discord lie not at all in the matters designated by the political distrust of the State; it is not at all in points ascribed by the calumny of the foes of the Church. The Church stands aloof from the new repartition of wealth, the nationalization of property; that has always been considered by it as the domain of the state, for the conduct of which it is not responsible. The Church also stands aloof from the political organization of authority, for it is loyal to the governments of all the countries within the limits of which it has its own members. It lives at peace with all the different types of state organization, beginning with such despots as were formerly in Turkey and ending with such Republics as the North American United States. The discord lies in the irreconcilability of the religious teaching of the Church with the materialism and the official philosophy of the Communistic Party and of the government of the Soviet Republic directed by that party.

The Church recognizes the existence of the spiritual principle; Communism denies it. The Church believes in the living God, Creator of the world, Guider of its life and fate; Communism does not admit His existence, believes

that the world was self-organized and that no reasonable principles or purposes govern its history. The Church sees the aim of man's life in the heavenly calling of the spirit, and never ceases reminding her children of their heavenly fatherland. She does this even when the conditions of outward culture and material well-being are at their height. Communism desires to know no other aim for man except his welfare upon earth. And this difference of ideology and philosophical viewpoint which exists between the Church and State manifests itself also in the realm of practical everyday life and in that of morality. The Church believes in the steadfast principles of morality, justice and law, Communism looks upon them as the conditional results of class-struggle, and values moral questions only from the standpoint of their usefulness. The Church instils the feeling of that humility which elevates man's soul; Communism abases man through his pride. The Church protects purity and the sacredness of childbirth. Communism sees but the satisfying of instincts in the marriage tie. For the Church religion is not only the living force enabling man to attain his heavenly destiny, but also the source of all that is greatest in human relation; which is the foundation of earthly welfare, happiness, and the health of nations. For Communism religion is the opium that drugs the nations, that weakens their energy; that is the source of their poverty and misfortunes. The Church wants religion to flourish. Communism wants it to perish. With such deep difference in fundamental principles separating the Church and State, it becomes impossible that an inner nearness or reconciliation could exist between them. There can be no reconciliation between assertion and negation, between yes and no. For the very soul of the Church, the circumstance of its existence and the reason for its being, is just that which is categorically denied by Communism.

By no compromise or concession, by no partial changes in its teaching, by no explanation of it in a communistic

spirit can the Church attain such a reconciliation. Pitiful attempts have been made in this direction by the "Regenerated" in the Church; some of them have tried to instil into the soul of the faithful the idea that Christianity and Communism are really similar in all important points; that a communistic state is striving to attain the same objectives as the Gospels, only by different means, i.e., not by religious persuasion, but by force. Others again have recommended reviewing Christian dogmatics in such a way as to present the teaching of the relations of God to the world in a manner that should not resemble the relation of a sovereign to his people, but should stand more in accordance with republican ideas. Others again have insisted that all saints of bourgeois origin should be excluded from the calendar and deprived of the veneration shown to them by the Church. All such attempts are not sincere and they have called for the deep indignation of the faithful.

The Orthodox Church will never stand on this unworthy path. It will never deny either the whole or part of that teaching which has come down to it from all that has been holy in the past centuries, in order to accommodate ever-shifting popular opinions. When the ideological difference of opinion between the Church and the state is so deep, it is unavoidable that it should be reflected in the everyday life of both these organisms. A conflict in the activity of both can be avoided only by the strict carrying out of the law regarding the separation of the Church from the state. According to this law the Church must in no wise mix itself in the activity of the civil government, which has to take care of the material welfare of the people. Neither must the state hinder the Church in its religious and moral activity.

Such a law was among the first issued by the revolutionary government; it has been incorporated into the constitution of the U.S.S.R., and might have, up to a certain point, satisfied both sides, now that the political system has been

so much modified. There are no religious motives preventing the Church from accepting it. Our Lord Jesus Christ has ordered us to give unto Caesar what belongs to Caesar, i.e., the material welfare of the people is the realm of the government. He left no commandments to His followers to seek to alter the forms of government or to guide its activity. According to the teaching and traditions of the Orthodox Church it has always stood aloof from politics, and has remained obedient to the state in all that did not concern its faith. That is the reason why it was able to remain loyal to the civil government both in former Turkey and in the ancient Roman Empire, even when it was quite alien to the government spiritually. A contemporary state can demand no more of it. A contemporary state, in opposition to former political theories, does not find it necessary that the political union of its citizens should be strengthened by an inner religious unity. It does not consider this of importance, and openly declares that it does not need the aid of the Church to attain the aims set before it, and that it allows its citizens complete religious liberty.

As things stand at present the Church only desires a systematic and complete carrying out in actual life of the law which separated the Church from the State".